IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2007 Session

WESTERN EXPRESS, INC. v. LEXINGTON INSURANCE COMPANY

Appeal from the Chancery Court for Davidson County
No. 05-2311-II Carol McCoy, Chancellor

No. M2006-02249-COA-R3-CV - Filed February 20, 2008

In this declaratory judgment action, the insured contests the trial court's ruling that a Commercial Property Policy provided no coverage for a theft loss and imposed no duty on the insurer to provide a defense for a claim arising out of that loss. The trial court found that the policy's Attended Vehicle Protective Provision was applicable and unambiguous, and thereby excluded the theft loss from coverage under the policy. Because there was no coverage for the theft loss, the trial court found that the insurer had no duty to defend the insured for claims arising out of that loss. The insured contends that the provisions of the insurance contract were ambiguous, that coverage was not clearly excluded for this loss, and that regardless, the insurer was obligated to provide a defense per a mandatory federal endorsement. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and E. RILEY ANDERSON, SP. J., joined.

Isham B. Bradley, Nashville, Tennessee, for the appellant, Western Express, Inc.

H. Frederick Humbracht, Jr., Nashville, Tennessee, for the appellee, Lexington Insurance Company.

OPINION

Western Express, Inc. is an interstate trucking company. Lexington Insurance Co. is an insurance carrier. Lexington provided a Commercial Property Policy to Western Express that was in effect at all times material to this action. The policy covered, *inter alia*, loss from theft of cargo.

The policy incorporated "Motor Truck Cargo Legal Liability Declarations" and within the Declarations were exclusions identified as "Protective Provisions." A "Protective Provisions" that

was specifically applicable "while hauling for . . . Menlo Logistics" was identified as "Attended Vehicle."[1]

On February 15, 2004, while a Western Express tractor-trailer was left unattended at a truck stop, the vehicle and all of its cargo were stolen. The cargo, Hewlett-Packard computers, was being transported by Western Express pursuant to a contract with Menlo Logistics, Inc. Western Express' tractor-trailer was subsequently found but none of the stolen cargo was ever recovered.

Thereafter, Menlo Logistics filed suit against Western Express to recover the value of the lost cargo. When Western Express notified Lexington of the suit, Lexington denied the claim and advised Western Express that it would not provide a defense for Western Express. As a consequence of Lexington's refusal to provide a defense, Western Express filed this action against Lexington seeking a declaratory judgment that Lexington was obligated under the Commercial Property Policy to provide a defense for Western Express in the Menlo Logistics suit and to indemnify Western Express if a judgment was rendered against it. Western Express also contended that Lexington was obligated to provide a defense because of an endorsement mandated by the Interstate Commerce Commission, Form BMC-32, regardless of whether the Attended Vehicle Protective Provision applies.

Shortly after the filing of this action, the parties entered into an agreement whereby Lexington, with full reservation of rights, agreed to pay the legal fees incurred by Western Express in defending the Menlo Logistics action.[2] The agreement also provided that Lexington would be entitled to reimbursement of any legal fees and costs paid by Lexington if it was subsequently determined that Lexington had no duty to provide a defense for Western Express in the Menlo Logistics action.

On November 16, 2005, a jury ruled that Menlo Logistics was entitled to recover its damages against Western Express for the loss of its cargo. Thereafter, Lexington filed an Answer and Counterclaim in this action seeking a declaratory judgment that it had no duty to defend or indemnify Western Express under the terms of the policy and a judgment against Western Express for all legal fees and costs it paid in defense of the Menlo Logistics action.

Thereafter, Lexington filed a Motion for Partial Summary Judgment seeking: (1) the dismissal of Western Express's claim against it, and (2) a "judgment declaring that the policy of insurance at issue in this action does not afford coverage for the loss resulting from a theft of cargo

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[1]The Motor Truck Cargo Legal Liability Declarations form states as follows:

> **Protective Provisions applicable:** Locked Vehicle; Kingpin Lock; GPS Tracking System; Unattended Vehicle; Secured Terminal as per Endorsement attached *and, while hauling for . . . Menlo Logistics - Attended Vehicle* . . . . (emphasis added)

[2]The agreement limited the legal fees to those incurred after the agreement was entered into by Western Express and Lexington as Western Express had not given Lexington prompt notice of the filing of the action by Menlo Logistics.

occurring on February 15, 2004, or for claims asserted against Western Express arising from that theft." Lexington argued that the loss was not covered by several of the Protective Provisions of the policy. Western Express contended, however, that due to the different Protective Provisions in the policy, the policy was ambiguous.

The Chancellor found there was no coverage under the policy because Western Express had failed to comply with the Attended Vehicle Protective Provision. The Chancellor also found that the BMC-32 Endorsement mandated by the Interstate Commerce Commission did not impose upon Lexington a duty to defend the claim by Menlo Logistics. Having prevailed on the coverage issue, Lexington was awarded a judgment of $99,999.30, as reimbursement of legal fees and costs paid to defend Western Express in the Menlo Logistics action in the amount. This appeal followed.

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001).

On appeal, this court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd v. Hall*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). Because the issues on appeal in the instant case involve a question of law only, the standard of review is *de novo* with no presumption of correctness as to the trial court's findings. *Phoenix Ins. Co. v. Estate of Ganier*, 212 S.W.3d 270, 274-275 (Tenn. Ct. App. 2006).

Issues concerning an insurance policy's coverage and an insurer's duty to defend require "the interpretation of the insurance policy in light of claims asserted against the insured." *Id.* at 275 (quoting *Allstate Ins. Co. v. Jordan*, 16 S.W.3d 777, 779 (Tenn. Ct. App. 1999)). "These issues present a question of law which can be resolved by summary judgment when the relevant underlying facts are not in dispute." *Phoenix*, 212 S.W.3d at 275 (citations omitted).

ANALYSIS

The rights and responsibilities of the parties arise from and are limited by the policy of insurance at issue. Courts are to construe insurance contracts in the same manner as any other contract. *Alcazar v. Hayes*, 982 S.W.2d 845, 848 (Tenn. 1998) (citations omitted). As with any other contract, the rule is to "ascertain the intention of the parties and to give effect to that intention,

consistent with legal principles." *Id.* (citing *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975)). The policy language must be given its common and ordinary meaning. *Angus v. Western Heritage Ins. Co.*, 48 S.W.3d 728, 731 (Tenn. Ct. App. 2000) (citing *Tata v. Nichols*, 848 S.W.2d 649, 650 (Tenn. 1993)).

When the language of an insurance contract is plain and unambiguous, its meaning is a question of law and it must be interpreted as written according to its plain terms. *See Erwin v. Moon Prods.*, No. M2002-00877-COA-R9-CV, 2003 WL 21797584, at *3 (Tenn. Ct. App. Aug. 5, 2003) (citing *Petty v. Sloan*, 277 S.W.2d 355 (Tenn. 1955)). "If the language of a written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties." *Erwin*, 2003 WL 21797584, at *3 (citing *First Nat. Bank of Crossville*, 620 S.W.2d 526 (Tenn. Ct. App. 1981)). Courts cannot "rewrite an insurance policy simply because we do not favor its terms or because its provisions produce harsh results." *Angus*, 48 S.W.3d at 731 (citations omitted). It is the duty of this court, in the absence of fraud, overreaching, or unconscionability, to "give effect to an insurance policy if its language is clear and its intent certain." *Id.* (citing *Quintana v. Tennessee Farmers Mut. Ins. Co.*, 774 S.W.2d 630, 632 (Tenn. Ct. App. 1989); *Black v. Aetna Ins. Co.*, 909 S.W.2d 1, 3 (Tenn. Ct. App. 1995)).

With these principles in mind, we begin our examination of the policy and provisions at issue. The relevant portion of the policy included what was identified as the "Motor Truck Cargo Legal Liability Declarations." The Declarations page specifically identified certain "Protective Provisions" that were applicable to Western Express and which imposed affirmative duties or conditions upon Western Express for there to be coverage for claims resulting from the theft of cargo. Six Protective Provisions were specifically identified as being applicable, and one of the Protective Provisions was specifically applicable when Western Express was hauling cargo for Menlo Logistics. That provision is the "Attended Vehicle" provision, and it reads as follows:

> **Attended "Vehicle"**
>
> [Lexington] will not pay for "loss" by theft of any "vehicle" unless at the time of theft, [Western Express], or your employee or other person whose only duty is to attend the "vehicle" is actually in or upon the "vehicle".

No Tennessee cases have been found that address a similar Attended Vehicle protective provision; however, other jurisdictions have addressed very similar provisions. *See Noe v. Homestead Ins. Co.*, 173 F.3d 581, 583 (6th Cir. 1999); *American Stone Diamond, Inc. v. Lloyds of London*, 934 F. Supp. 839, 843 (S.D. Tex. 1996). The Attended Vehicle provision at issue in *American Stone Diamond* stated that the insurance company will not cover property losses from vehicles unless, at the time of the loss, "there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle." 934 F. Supp. at 843. After conducting extensive research on the protective provision at issue, the *American Stone Diamond* court stated:

Courts have consistently held nearly identical policy language to be unambiguous and, based upon such exclusions, have denied coverage to insureds who were not literally in or upon their vehicles at the time of the losses, even though the insureds may have been only a short distance away from the vehicle, watching the vehicle, or absent from the vehicle for only a short period of time. *See, e.g.*, *Williams v. Fallaize Ins. Agency, Inc.*, 220 Ga. App. 411, 469 S.E.2d 752 (Ga. Ct. App. 1996) (exclusion applicable where insured was in store 25 feet from vehicle at time of theft); *Wideband Jewelry Corp. v. Sun Ins. Co. of N.Y.*, 210 A.D.2d 220, 619 N.Y.S.2d 339 (N.Y. App. Div. 1994) (exclusion applicable where insured's employee was six feet from vehicle at time of theft); *Jerome I. Silverman, Inc. v. Lloyd's Underwriters*, 422 F. Supp. 89 (S.D.N.Y. 1976) (exclusion applicable where insured was temporarily away from vehicle at time of theft); *Revesz v. Excess Ins. Co.*, 30 Cal. App. 3d 125, 106 Cal. Rptr. 166 (Cal. Ct. App. 1973) (exclusion applicable where insured was getting directions a few feet from vehicle at time of theft); *Royce Furs, Inc. v. Home Ins. Co.*, 30 A.D.2d 238, 291 N.Y.S.2d 529 (N.Y. App. Div. 1968) (exclusion applicable where insured was registering inside hotel for a few minutes while vehicle was six to ten feet outside hotel at time of theft); *American Charm Corp. v. St. Paul Fire & Marine Ins. Co.*, 56 Misc. 2d 574, 289 N.Y.S.2d 383 (N.Y. App. Term 1968) (exclusion applicable where insured was in his home with vehicle locked in adjacent garage at time of theft); *Phil G. Ruvelson, Inc. v. St. Paul Fire & Marine Ins. Co.*, 235 Minn. 243, 50 N.W.2d 629 (Minn. 1951) (exclusion applicable where insured was away from vehicle for a few minutes to use bathroom and drink cup of coffee at time of theft). *See especially JMP Associates, Inc. v. St. Paul Fire & Marine Ins. Co.*, 109 Md. App. 343, 674 A.2d 562 (Md. Ct. Spec. App. 1996) (exclusion applicable where insured was inside service station paying for gasoline at time of theft).

Plaintiff cites, and the Court is aware of, no published cases holding contrary to the authority cited above. The Court otherwise discerns no basis for concluding that these cases are wrongly-decided. Indeed, the use of the word "actually" in the requirement that the assured or properly-designated person be "actually in or upon" the vehicle at the time of loss belies any contention that constructive possession of the type urged by Plaintiff can avoid the exclusion. *See Royce Furs*, 291 N.Y.S.2d at 531 (The "in or upon the vehicle" language of the coverage exclusion "is prefixed by the word 'actually.' That word must be given a meaning."); *Revesz*, 106 Cal.Rptr. at 168 (Agreeing with courts that "placed great emphasis on the word 'actually,' indicating that it clearly negates constructive presence and possession."). *See also Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n, Inc.*, 783 F.2d 1234, 1238 (5th Cir.1986), citing *Blaylock v. Am. Guarantee Bank Liab. Ins. Co.*, 632 S.W.2d 719, 722 (Tex.1982) ("[W]e attempt to construe a contract so as to avoid rendering any of its terms meaningless."); *Praeger v. Wilson*, 721 S.W.2d 597, 601 (Tex.App.-Fort Worth 1986, writ ref'd n.r.e.) ("A construction of the writing which renders a clause meaningless is unreasonable and, therefore, is not preferred by the court.").

934 F. Supp. at 843-44.

The court in *American Stone Diamond* concluded "as a matter of law that the exclusionary language of the Policy at issue is unambiguous and, under the undisputed facts of this case, precludes coverage for Plaintiff's loss." *Id.* at 844. We have likewise determined, as did the Chancellor, that the protective provision at issue is unambiguous and that provision stated that Lexington would not pay for loss by theft of any vehicle unless at the time of theft, an employee of Western Express or other person whose only duty is to attend the vehicle was actually in or upon the vehicle. It is undisputed that the theft of Menlo Logistic's cargo occurred while Western Express' driver was away from the vehicle, inside the truck stop. Accordingly, the vehicle was unattended when the vehicle and cargo were stolen. Therefore, there was no coverage and no duty to defend.

The BMC-32 Endorsement

As an additional argument, Western Express contends that Lexington was obligated to provide a defense because of an endorsement mandated by the Interstate Commerce Commission regardless of whether the Attended Vehicle Protective Provision applies.

The Interstate Commerce Commission, by regulation, requires all common carriers, such as Lexington, to provide a minimum of security to compensate shippers, such as Menlo Logistics, for loss or damage caused by trucking companies, such as Western Express. *See M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.*, 432 F.3d 127, 131 (2d Cir. 2005). This mandatory endorsement is known as "BMC-32 coverage," as that is the number of the standard form that is to be incorporated in all cargo insurance policies. *Id.* The BMC-32 endorsement at issue reads as follows:

Endorsement for
Motor Common Carrier Policies of Insurance
for Cargo Liability Under 49 U.S.C. 13906

> The policy to which this endorsement is attached is a cargo insurance policy, and is hereby amended to assure compliance by the insured, as a common carrier of property by motor vehicle, with Section 13906, Title 49 of the United States Code, with reference to making compensation to shippers or consignees coming into possession of such carrier in connection with its transportation service under certificate issued to the insured by the Federal Highway Administration (FHWA), or otherwise in transportation in interstate or foreign commerce subject to FHWA rules and regulations.
>
> In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby agrees to pay within the limits of liability hereinafter provided, any shipper or consignee for all loss of or damage to all property belonging to such shipper or consignee, and coming into the possession of the insured in connection with such transportation service, for which loss or damage the insured may be held legally liable, regardless of whether or not the motor vehicles, terminals, warehouses, and other facilities used in connection with the transportation of the property hereby insured are specifically described in the policy.

> The liability of the Company extends to such losses or damages whether occurring on the route or in the territory authorized to be served by the insured or elsewhere.
>
> Within the limits of liability hereinafter provided, it is further understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement by the insured, shall affect in any way the right of any shipper or consignee, or relieve the Company from liability for the payment of any claim arising out of such transportation service for which the insured may be held legally liable to compensate shippers or consignees, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the Company. The insured agrees to reimburse the Company for any payment made by the Company on account of any loss or damage involving a breach of the terms of the policy and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.
>
> The liability of the Company for the limits provided in this endorsement shall be a continuing one notwithstanding any recovery hereunder. The Company shall not be liable for an amount in excess of $5,000 in respect to all losses or damages to property hereby insured carried on any one motor vehicle, nor in any event for an amount in excess of $10,000, in respect to any loss of or damage to or aggregate of losses or damages of or to such property occurring at any one time and place.

We have found no opinions, in Tennessee or elsewhere, that shed any light on the duty to defend as it relates to the BMC-32 coverage. We, however, have found cases that have analyzed a substantially similar endorsement, identified as MCS-90 coverage, which is instructive. Like the BMC-32 coverage, MCS-90 coverage is mandated by the Interstate Commerce Commission and it too serves the purpose of assuring a minimal recovery. MCS-90 coverage pertains to both personal injury or property damage to third parties, as distinguished from the shipper, caused by a trucking company. *See Kline v. Gulf Ins. Co.*, 466 F.3d 450, 455 (6th Cir. 2006); *M. Fortunoff of Westbury Corp.*, 432 F.3d at 131.

In an MCS-90 coverage case, where no coverage was afforded under the policy because the policy only insured vehicles listed in the policy, the court determined that the MCS-90 endorsement did *not* impose a duty to defend upon the insurance company. *Harco Nat'l Ins. Co. v. Bobac Trucking*, 107 F.3d 733, 735-736 (9th Cir. 1997). The court went on to note that "*federal courts have consistently stated that the MCS-90 endorsement does not create a duty to defend claims which are not covered by the policy but only by the endorsement.*' *Id.* (citing *Canal Ins. Co. v. First General Ins. Co.*, 889 F.2d 604, 610 (5th Cir. 1989), modified on other grounds, 901 F.2d 45 (5th Cir. 1990) ('Because the accident did not involve a listed vehicle, Canal had no duty [under the MCS-90] to defend Custom.'); *National Am. Ins. Co. v. Central States Carriers, Inc.*, 785 F. Supp. 793, 797 (N.D. Ind. 1992) ('The [MCS-90] endorsement was clearly not an insurance policy

requiring National American to defend Central States.'); *see also Carolina Casualty Ins. Co. v. Insurance Co. of N. Am.*, 595 F.2d 128, 144 (3d Cir. 1979) ('We conclude that nothing in the . . . ICC endorsement alters otherwise existing duties to defend.')) (emphasis added).

We find the foregoing cases most persuasive. Moreover, we find no basis in fact or law upon which to conclude that the BMC-32 endorsement, without more, imposed a duty on Lexington to provide a defense for Western Express in the Menlo Logistics action.

IN CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed in all respects. This matter is remanded with costs of appeal assessed against Western Express.

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FRANK G. CLEMENT, JR., JUDGE